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TENAGA NASIONAL BHD v. ASIA KNIGHT BHD

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
VERNON ONG LAM KIAT JCA
HASNAH MOHAMMED HASHIM JCA

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[CIVIL APPEAL NO: C-02(NCVC)(W)-425-03-2016]
8 NOVEMBER 2017

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UTILITIES: *Electricity – Consumption and usage – Tampering – Allegation of – Claim for loss of revenue and expenses – Whether there was meter-tampering – Whether liability proved on balance of probabilities – Whether there was statutory requirement that claimant must prove customer had access to meter installation before claim for loss of revenue could be made – Whether claimant required to show evidence of meter-tampering from recording of consumption of electricity by customer – Electricity Act 1990, s. 38(1), (3) & (4)*

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UTILITIES: *Electricity – Consumption and usage – Claim for loss of revenue and expenses – Whether quantum of damages proved on balance of probabilities – Whether method of calculation for loss of revenue correct – Whether claimant established prima facie case of claim for expenses – Whether rebutted by customer – Electricity Act 1990, s. 38(1), (3) & (4)*

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Following the discovery of a foreign object inserted as bypass at the test terminal block of the meter installation at the respondent's ('the defendant') premises, the appellant ('the plaintiff') commenced a claim at the High Court against the defendant for loss of revenue and expenses due to meter-tampering pursuant to s. 38 of the Electricity Act 1990 ('the Act'). Dismissing the claim, the High Court held that, *inter alia*, (i) the plaintiff failed to prove that the defendant had access to the meter installation; and (ii) the calculation of the undercharged amount was not correct as the plaintiff failed to take into account the defendant's production report. Hence, the present appeal. In support of its appeal, the plaintiff submitted that (i) it had succeeded in proving meter-tampering on the balance of probabilities as (a) s. 38 of the Act does not require the plaintiff to prove that the defendant had access to the meter installation before a claim for loss of revenue could be made by the plaintiff; and (b) all that the plaintiff was required to show was that there was evidence of meter-tampering from the recording of the consumption of electricity by the defendant; and (ii) even if the defendant's production report were considered, they would not support the defendant's main defence that the usage of electricity at the defendant's premises was not consistent and was dependent on orders made for the products.

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Held (allowing appeal; setting aside order of High Court)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The High Court Judge ('the HCJ') did not make any finding that there was no meter-tampering but took the position that there was no evidence to prove that the defendant had access to the meter installation or had tampered the meter. The non-finding on the question of whether the meter was tampered was a serious misdirection on the facts and on the law. The evidence produced by the plaintiff was consistent and credible. On the totality of the evidence, the plaintiff had succeeded in proving that the meter was tampered on the balance of probabilities. (para 11)

(2) The findings of the HCJ on liability was set aside. Section 38(3) of the Act does not require the plaintiff to prove that the perpetrator of the tampering was the defendant or that the defendant had access to the meter installation before a claim for loss of revenue could be made by the plaintiff. The plaintiff's entitlement to claim for the loss of revenue was a statutory right conferred on the plaintiff under s. 38(3) read together with sub-s. (1) of the Act. (para 12)

(3) The Act does not prescribe any specific method of calculation for loss of revenue. Based on the facts of this case, the average consumption method of computation was a fair, acceptable and reasonable method to be employed in arriving at the quantum of loss of revenue. Furthermore, in accordance with s. 38(4) of the Act, evidence specifying the amount of expenses incurred by the plaintiff shall be *prima facie* evidence of payment that has to be made by the defendant. In the absence of rebuttal evidence of the *prima facie* case established by the plaintiff, the plaintiff's claim for expenses incurred had been proved on a balance of probabilities. (paras 13 & 14)

***Bahasa Malaysia** Headnotes*

Berikutan penemuan objek asing yang dimasukkan sebagai pemintas dalam blok terminal pengujian pada pepasangan meter di premis responden ('defendan'), perayu ('plaintif') memulakan tuntutan di Mahkamah Tinggi terhadap defendan bagi kerugian hasil dan perbelanjaan akibat usikan meter bawah s. 38 Akta Elektrik 1990 ('Akta'). Menolak tuntutan tersebut, Mahkamah Tinggi memutuskan, antara lain, bahawa (i) plaintif gagal membuktikan defendan mempunyai akses terhadap pepasangan meter; dan (ii) pengiraan jumlah bayaran kurang tidak betul kerana plaintif gagal mengambil kira laporan pengeluaran defendan. Maka timbul rayuan ini. Menyokong rayuannya, plaintif menghujahkan (i) telah berjaya dalam membuktikan usikan meter atas imbangan kebarangkalian kerana (a) s. 38 Akta tidak mengkehendaki plaintif membuktikan defendan mempunyai akses pada pepasangan meter sebelum tuntutan kerugian hasil boleh dibuat oleh plaintif; dan (b) yang plaintif perlu buktikan adalah terdapat bukti usikan meter

berdasarkan rekod penggunaan elektrik defendan; dan (ii) jika pun laporan pengeluaran defendan dipertimbangkan, kesemuanya tidak akan menyokong pembelaan utama defendan bahawa penggunaan elektrik di premis defendan tidak konsisten dan bergantung pada tempahan produk yang dibuat.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)

Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Hakim Mahkamah Tinggi ('HMT') tidak membuat apa-apa dapatan bahawa tiada usikan meter tetapi berpendapat bahawa tiada keterangan yang menunjukkan defendan mempunyai akses pada pepasangan meter atau telah mengusik meter. Ketiadaan dapatan bagi soalan sama ada meter tersebut diusik adalah satu salah arah serius fakta dan undang-undang. Keterangan yang dikemukakan oleh plaintif konsisten dan boleh dipercayai. Berdasarkan keseluruhan keterangan, plaintif berjaya membuktikan, atas imbangan kebarangkalian, meter tersebut diusik.

(2) Dapatan HMT tentang liabiliti diketepikan. Seksyen 38(3) Akta tidak mengkehendaki agar plaintif membuktikan pelaku usikan adalah defendan atau bahawa defendan mempunyai akses terhadap pepasangan meter sebelum tuntutan kerugian hasil boleh dibuat oleh plaintif. Hak plaintif untuk menuntut kerugian hasil adalah hak statutori yang diberi kepada plaintif bawah s. 38(3) dibaca bersama-sama dengan sub-s. (1) Akta.

(3) Akta tidak memperuntukkan apa-apa cara spesifik pengiraan kerugian hasil. Berdasarkan fakta kes ini, cara pengiraan melalui purata penggunaan adalah cara yang adil, boleh diterima dan munasabah untuk diguna pakai bagi mendapatkan kuantum kerugian hasil. Selanjutnya, menurut s. 38(4) Akta, keterangan yang menyatakan jumlah perbelanjaan yang dikeluarkan oleh plaintif adalah keterangan *prima facie* bayaran yang harus dibuat oleh defendan. Tanpa keterangan yang menyangkal kes *prima facie* yang dibuktikan oleh plaintif, tuntutan plaintif bagi perbelanjaan yang dikeluarkan telah terbukti atas imbangan kebarangkalian.

Case(s) referred to:

Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd [2006] 4 CLJ 892 CA ***(refd)***

Ichi-Ban Plastic (M) Sdn Bhd v. Tenaga Nasional Bhd [2015] 10 CLJ 14 CA ***(refd)***

Tenaga Nasional Bhd v. AWP Enterprise (M) Sdn Bhd [2015] 1 CLJ 400 CA ***(refd)***

Tenaga Nasional Bhd v. Dunia Raya Enterprise Sdn Bhd [2015] 6 CLJ 751 CA ***(refd)***

Tenaga Nasional Bhd v. Empayar Canggih Sdn Bhd [2013] 1 LNS 637 HC ***(refd)***

Tenaga Nasional Bhd v. Pelantar Cergas Sdn Bhd (Civil Appeal No. W-02(NCC)(W)-1552-07-2012 (Unreported) ***(refd)***

Tenaga Nasional Bhd v. Perniagaan Heng Thye Sdn Bhd (Civil Appeal No. K-04(NCVC)(W)-59-02-2014 (Unreported) ***(refd)***

Tenaga Nasional Bhd v. Ternakan Air Wui Kyee Sdn Bhd & Another Appeal [2015] 5 CLJ 955 CA ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd (Judicial Review Application No. R1-25-24-2010 (Unreported) ***(refd)***

Legislation referred to:
Electricity Supply Act 1990, s. 38(1), (3), (4)

For the appellant - Raja Ahmad Mohzanuddin Shah Raja Mohzan & Nur Fardhiah Mohd Nawawi; M/s Azmi & Assocs
For the respondent - Dinesh Nair & CM Lai; M/s Bahari Choy & Nongchik

[Editor's note: Appeal from High Court, Kuantan; Suit No: 22NCVC-11-02-2014 (overruled).]

Reported by Najib Tamby

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] This is the plaintiff's appeal against the dismissal of its claim against the defendant, a registered customer of electricity supply, for loss of revenue and expenses due to meter tampering pursuant to s. 38 of the Electricity Supply Act 1990 ("EA 1990").

[2] On 20 February 2017, after hearing of submission of counsel of the parties, we allowed the plaintiff's appeal with costs. We now set out our reasons for our decision. In this judgment, the parties shall be referred to as they were in the court below.

Brief Account Of The Salient Facts

[3] On 29 September 2010, a team of the plaintiff's employees conducted an inspection of the meter installation at the defendant's premises. The plaintiff's employee found physical evidence of tampering to the meter installation in the form of a foreign copper object inserted as a by-pass at the test terminal block ('TTB'). Photographs taken of the physical evidence of tampering together with the 'borang siasatan perjangkaan LPC MV/HV', 'surat pemakluman semakan meter', 'surat pemberitahuan pengambilan barang kes' and a police report were produced at the trial.

Findings Of The High Court

[4] The claim was dismissed on the main ground that the plaintiff had failed to prove that the defendant had access to the meter installation. In dismissing the plaintiff's claim, the learned judge found among others, that:

a) As the defendant had no access to the meter room, anything that happened in the meter room was not within the defendant's knowledge and responsibility;

A b) The plaintiff failed to prove that the foreign copper object at the TTB was inserted by the defendant;

c) There was no evidence to prove that the blown fuse was caused by the defendant's action;

B d) There was no finality on the findings made of the tampering as the inspection form was not verified by the plaintiff's senior officer; and

e) The calculation of the undercharged amount from 28 September 2008 to 29 September 2010 was not correct because the computation did not take into account, among others, (i) the fact that there was a change of C meter on 10 March 2010, (ii) the defendant's manufacturing activities had shown that there was some fluctuation in the electricity consumption at the defendant's premises, and (iii) previous inspections at the defendant's premises on 28 March 2009 and 21 April 2009 had shown that there abnormalities and that the meter was not in good D working condition.

Submission Of Parties

[5] Before us, learned counsel for the plaintiff mounted his case on two main grounds – (i) there was proof of meter tampering and (ii) the computation of loss or revenue and expenses is correct.

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[6] Firstly, he argued that the plaintiff had succeeded in proving meter tampering on the balance of probabilities despite the learned judge's finding that the plaintiff had failed to prove that the defendant had access to the meter installation. Section 38 of the EA 1990 does not require the plaintiff to prove F that the defendant had access to the meter installation before a claim for loss of revenue can be made by the plaintiff. All that the plaintiff is required to show is that there was evidence of tampering of the meter installation which prevented the meter from duly recording the consumption of electricity by the defendant. Further, in holding that the plaintiff had to prove that the defendant had access to the meter installation and that the tampering was G committed by the defendant, the learned judge had imposed a higher standard of proof of beyond reasonable doubt on the plaintiff to prove its case; the plaintiff was only required to prove its case on a balance of probabilities (*WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296 (FC)).

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[7] Learned counsel also argued that under sub-s. 38(3) of the EA 1990 the plaintiff need not prove that the defendant tampered with the meter installation; it is sufficient if the plaintiff can show that the meter has been tampered (*Tenaga Nasional Bhd v. Dunia Raya Enterprise Sdn Bhd* [2015] 6 CLJ 751 (CA)). Further, it is clear that the defendant had benefited from the I tampered meter installation and as such it would be abhorrent to justice and

fair play for the court to condone a consumer who has benefited to escape payment to the plaintiff for its electricity usage (*Tenaga Nasional Bhd v. Ternakan Air Wui Kyee Sdn Bhd & Another Appeal* [2015] 5 CLJ 955 (CA)).

[8] On the second issue, learned counsel argued that the learned judge erred in holding that the plaintiff failed to take into account the defendant's production report. Instead of producing the complete daily reports, the defendant only produced selected daily reports. Daily reports were produced in respect of non-production days even though the defendant's own witnesses said that when there was no production, no daily report was prepared. Further, daily reports prepared for Sundays actually contradicted the defendant's evidence that they had not for years operated on most Sundays because of the double overtime costs for their workers.

[9] Even if the defendant's production reports were considered, they would not support the defendant's defence which were mounted on the following grounds: (i) the usage of electricity at the defendant's premises was not consistent and was dependent on orders made for the products, (ii) the inconsistency of electricity usage was due to the combination of two production lines at the defendant's premises, (iii) from 2008 to 2009, there was an economic downturn and therefore production was reduced, (iv) the inconsistency in the electricity usage was also caused by a fire at the factory on 24 July 2010, (v) the defendant bought new machines from China to made wood pallets in 2010, and (vi) the defendant's electricity usage was consistent with the issued bills and the defendant had paid those bills without fail and without complaint from the plaintiff.

[10] In reply, learned counsel for the defendant raised the following arguments. Firstly, the meter installation could not have been tampered because the meter was located in a special room which was locked with the plaintiff's own padlock and that no one else except for the plaintiff's staff had the key to the padlock. The learned judge was correct in finding that the plaintiff had failed to prove that the defendant had access to the meter room to tamper with the meter. Secondly, sub-s. 38(3) of the EA 1990 did not exempt the plaintiff from having to prove that the defendant tampered with the meter. The onus is on the plaintiff to prove that the meter was tampered. There was no finding of fact of tampering by the learned judge. Thirdly, there were at least two inspections conducted by the plaintiff's employees on 28 March 2009 and 21 April 2009 prior to 29 September 2010 which did not show any evidence of tampering. Further, the meter was changed about six months before the inspection date. As such, there were intervening events during the two-year period. Lastly, the learned judge was correct in her assessment of the evidence on quantum. As such, the plaintiff had not shown that the learned judge's findings were plainly wrong.

A **Decision**

[11] In our considered opinion, the central issue for determination relates to the question of whether the plaintiff had succeeded in proving that the meter installation was tampered. On a perusal of the appeal record, we are satisfied that there is uncontroverted evidence to show that the meter
B installation had been tampered. The discovery of the foreign copper object which was inserted in the meter is proof of the fact of tampering. We agree with the submission of learned counsel for the plaintiff that the evidence produced by the plaintiff's witnesses were consistent and credible. It was also corroborated by the production of the photographs, the 'borang siasatan
C perjangkaan LPC MV/HV', 'surat pemakluman semakan meter', 'surat pemberitahuan pengambilan barang kes' and police report. In this connection, we have perused the learned judge's written judgment and note that the learned judge did not make any finding that there was no tampering of the meter. Instead, the learned judge took the position that there was no
D evidence to prove that the defendant had access to the meter installation or had tampered with the meter. In other words, there was a non-finding on the question of whether the meter was tampered, which in our considered view is a serious misdirection on the facts and on the law. We also find support for our view in the Federal Court decision which held that only a subjective
E finding of the plaintiff's employee is required to prove tampering *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd (supra)*. On the totality of the evidence, we are of the view that on a balance of probabilities, the plaintiff had succeeded in proving that the meter was tampered.

[12] Be that as it may, the learned judge also took the view that the
F defendant could not be liable for the loss of revenue as it was not proved that the defendant had access to the meter room or had tampered with the meter. In our considered view, sub-s. 38(3) of the EA 1990 does not require the plaintiff to prove that the perpetrator of the tampering was the defendant or that the defendant had access to the meter installation before a claim for loss
G of revenue can be made by the plaintiff. We agree with the argument of the plaintiff that the plaintiff's entitlement to claim for the loss of revenue is a statutory right conferred on the plaintiff under sub-s. 38(3) read together with sub-s. 38(1) of the EA 1990. We find support for our view in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* (Judicial Review Application No. R1-25-24-2010; *Tenaga Nasional Bhd v. Dunia Raya Enterprise Sdn Bhd* [2015]
H 6 CLJ 751 (CA); *Tenaga Nasional Bhd v. Ternakan Air Wui Kyee Sdn Bhd & Another Appeal* [2015] 5 CLJ 955 (CA); *Tenaga Nasional Bhd v. Empayar Canggih Sdn Bhd* [2013] 1 LNS 637; [2014] 8 MLJ 280; *Tenaga Nasional Bhd v. AWP Enterprise (M) Sdn Bhd* [2015] 1 CLJ 400; [2015] 3 MLJ 268 (CA); *Tenaga Nasional Bhd v. Perniagaan Heng Thye Sdn Bhd* (Civil Appeal No.
I K-04(NCVC)(W)-59-02-2014). In this connection, we would also add that

there is also no legal requirement for there to be a prosecution and conviction first before a claim for loss of revenue is made (*Ichi-Ban Plastic (M) Sdn Bhd v. Tenaga Nasional Bhd* [2015] 10 CLJ 14; [2014] 6 MLJ 461 (CA); *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd* [2006] 4 CLJ 892; [2007] 1 MLJ 217 (CA)). Accordingly, we are constrained to set aside the findings of the learned judge on liability and to hold that the plaintiff is entitled to claim for loss of revenue and expenses from the defendant pursuant to sub-s. 38(3) of the EA 1990.

[13] As to the quantum of the loss of revenue, we observe that the EA 1990 does not prescribe any specific method of calculation for loss of revenue. Nevertheless, we are of the view that on the facts of this particular case (ie, the sudden drop in electricity consumption of 71%), the average consumption method of computation is a fair, acceptable and reasonable method to be employed in arriving at the quantum of loss of revenue (*Tenaga Nasional Bhd v. Pelantar Cergas Sdn Bhd* (Civil Appeal No. W-02(NCC)(W)-1552-07-2012 (FC)). We have examined the evidence of the executive/engineer (PW4), who conducted the back-billing calculations to generate the amount of loss of revenue under supervision of the main engineer (PW5). PW4 had based the calculation from 28 September 2008 which was the date where there was a sudden drop in the electricity consumption at the defendant's premises to 29 September 2010, the date of the inspection. In arriving at the amount of under-billing, PW4 applied the average rate of electricity consumption. PW4's evidence was comprehensive, consistent and credible and demonstrates how the estimate is arrived at in calculating the back charges to be imposed. The defendant has not demonstrated that the back charges to be manifestly unreasonable, excessive or wrong. In her written judgment, the learned judge decided that the plaintiff was not entitled to the loss of revenue and expenses '[b]erdasarkan kepada keterangan saksi plaintif pengiraan jumlah terkurang caj daripada 9/2008 – 9/2010 adalah tidak betul dan sangat memprejudiskan defendan apabila penukaran meter baru dibuat pada Mac 2010.' We are also constrained to find that the learned judge had failed to judicially appreciate the evidence and that if she had done so, she would have found that the plaintiff had established their claim for the loss or revenue on a balance of probabilities.

[14] We now turn to the claim for expenses in the sum of RM5,247.46 pursuant to sub-s. 38(3) of the EA 1990. The claim was dismissed by the learned judge on the grounds that (i) the plaintiff failed to produce any bills or receipts to support the claim, and (ii) the plaintiff failed to provide any particulars of the standard price or the plaintiff's guideline on the rates. With respect, we think the learned judge had misdirected herself on the law. In this instance, the written statement relating to the expenses incurred dated 29 September 2010 (exh. P12) was prepared by one Yong Boon Heng,

A Jurutera SEAL-MV/HV was produced and marked as an exhibit. As such, in accordance with sub-s. 38(4) of the EA 1990, exh. P12 specifying the amount of the expenses incurred by the plaintiff shall be *prima facie* evidence of payment that has to be made by the defendant. In the absence of rebuttal evidence of the *prima facie* case made out by the plaintiff, we are satisfied that
B the plaintiff's claim for expenses incurred has been proved on a balance of probabilities.

[15] For the foregoing reasons, we set aside the order of the High Court and allowed the plaintiff's appeal with costs.

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